

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

MAYA NYE, et al.

Plaintiffs,

v.

Case No. 2:11-cv-00087

BAYER CROPSCIENCE, L.P.,

Defendant.

**EMERGENCY MOTION FOR CLARIFICATION OF
AND RELIEF FROM TEMPORARY RESTRAINING ORDER;
AND REQUEST THAT THE MOTION
BE DECIDED AT THE EARLIEST POSSIBLE TIME**

Bayer CropScience, L.P. ("BCS") respectfully submits the following in support of this Motion, requests that it be decided by this Court at the earliest possible time, will provide an affidavit verifying the statements regarding the MIC Safety Enhancement Project that are made herein as soon as it can be accomplished, and will provide testimony at a hearing if the Court deems it necessary:

I. This Court's TRO entered on 10 February 2011 (Doc. 16) states:

For the foregoing reasons, the court ORDERS that the defendant, Bayer CropScience, L.P., and its officers, agents, servants, and employees and any other person in active concert or participation with the defendant be, and hereby are ENJOINED and RESTRAINED from resuming or engaging in the production of methyl isocyanate at its chemical plant in Institute, West Virginia. The court **ENJOINS and RESTRAINS the parties referenced above from participating or engaging in any part of the manufacture of methyl isocyanate.**

2. In light of the text of the TRO emphasized in the quote above and certain statements made by the Court at the hearing on 10 February 2011, BCS ceased as quickly as

possible all activities of any kind whatsoever associated in any way with the MIC Safety Enhancement Project, including, *inter alia*, all physical construction or reconfiguration, testing, purging, cleaning, training, drafting of procedures and protocols, or other actions necessary to assure that the modified facility is properly prepared and maintained for possible later use. BCS management, engineers, and safety personnel have reviewed the situation in detail over the past two days and, as invited by the Court at the hearing, BCS now seeks clarification of its Order. BCS respectfully requests that this Court grant BCS permission to complete the commissioning process for the modified facility, which includes commissioning of the unit and activation of energy and utility systems, for these reasons:

- a. No MIC exists at the Institute Plant at this time.
- b. **Completing the commissioning process will not create even a single molecule of MIC.**
- c. It is the collective professional judgment of BCS management, engineers, and safety personnel that leaving the partially-completed facility and attendant activities in their current state increases the potential risk for an incident or safety problem of some kind both while the TRO is in force and during any decommissioning or resumption of preparation for commissioning that would take place after the Court rules on the Preliminary Injunction. This additional risk will not exist if we are permitted to use the current crews and other involved BCS employees to complete all MIC Safety Enhancement Project work, including commissioning of the unit and activation of energy and utility systems.
- d. **BCS again emphasizes that completing commissioning of the unit and activation of energy and utility systems would not create even one molecule of MIC**, but represents the safest way to keep the unit on standby for a prolonged period of time. It is critical for the safety of employees who are in and around the unit to proceed to bring the unit to a well-defined, fully tested, stable status and to complete all other prerequisites so that it can be properly monitored and maintained in standby mode.
- e. These activities are important to ensure that safety aspects are properly considered and integrated concurrently with the implementation of engineering and mechanical systems. If this work cannot continue, there is a real concern that this loss of continuity could lead to unanticipated problems created by a cessation of activity.
- f. BCS recognizes that by completing the MIC Safety Enhancement Project through commissioning of the unit and activation of energy and utility systems, it

will be spending additional funds which may ultimately be for naught if this Court grants a Preliminary Injunction that is upheld and BCS is never allowed to actually use the unit. However, BCS believes and respectfully submits that spending this incremental amount is in the best interests of the company, our neighbors, the community, and is particularly important to ensure the safety of our employees; accordingly, BCS will not include in any calculation of economic harm relating to this proceeding any money that it spends toward commissioning of the unit and activation of energy and utility systems and the maintenance and preservation of the MIC unit during the TRO period.

3. If this Court is unwilling to grant this Motion as expressed above and permit BCS to complete all MIC Safety Enhancement Project work, including commissioning of the unit and activation of energy and utility systems, then BCS respectfully requests that the Court authorize the following to be done, which items represent our best judgment as to the absolute minimum actions necessary to achieve an acceptable status. **As with the completion of all MIC Safety Enhancement Project work, including commissioning of the unit and activation of energy and utility systems, completing the activities set out below does not in any way involve starting any part or parts of the MIC process for production and would not create even a single molecule of MIC:**

Activity to continue	Justification
Operator training	Training of operators and maintenance technicians needs to continue. All equipment of the MIC Safety Enhancement Project has been installed and it is important for the safe handling of this equipment that employees fully understand its design and operation to keep the unit safe, even when the equipment is not in operation.
Write SOPs (Standard Operating Procedures)	Standard Operating Procedures are a key element of a safe unit and need to be kept updated. With all the new equipment that has already been installed, it is important that activities to update the SOPs are completed.
A4 safety certificate	This safety certificate evaluates if all activities of a Process Hazard Analysis (PHA) have been implemented as intended. This is an important process to ensure that safety measures have been implemented as intended.
Operation and maintenance of air emission control equipment	The continued operation of all vent scrubbers and the vent gas incinerator, as well as all activities to keep such equipment repaired, is important to avoid emissions of solvents that are present in the unit even when the unit is not operating. This is also a requirement of our air quality permits.

Activity to continue	Justification
Complete configuration of the graphic display of the computerized control system.	The graphic display of the computerized control system is the main source of information that the operator has to control the process and get information regarding equipment conditions. The installation of much new equipment in the unit has already been completed; this requires modification of the graphic displays to correctly reflect the new conditions. At this time the graphics have not been completed. It is important that they be completed so the display of information on the computer correctly reflects the installations in the unit, even when that equipment is shut down. Several contracted computer experts were in the process of completing this configuration. Those experts are intimately familiar with the process, the MIC Safety Enhancement Project and the safety concepts of the computer control system. These experts are contractors with specific skills pertaining to the programming of distributed control systems.
Complete Instrument Loop and Interlock checks.	All new process control equipment that has been installed was in the process of being checked for correct operation. While the installation of the equipment itself is complete, it is important for process safety that all such equipment be fully checked for correct operation. This activity was in progress, but not completed. To complete these checks, instrument technicians in cooperation with computer experts and operators review the correct transmission and display of information from the unit. They also verify that safety interlocks (which safely shut down specific equipment if critical parameters are exceeded) function as designed. To ensure a safe condition of the unit even during shut down, it is important that these activities be completed.
Equipment labeling	The labeling of new equipment was in progress, but is not complete. It is an important part of process safety, even when equipment is shut down, that all equipment be correctly labeled. All labels have been printed and are available for installation. BCS needs to complete this labeling.
Commissioning of air monitoring systems	As part of the MIC Safety Enhancement Project, several new air monitoring systems have been installed in the unit. They monitor specifically for Phosgene, MIC, and for an oxygen deficient atmosphere and explosive atmosphere both in the MIC unit and in the MIC storage building. These systems rely on advanced analyzer technology and require the presence of highly trained analyzer experts to be commissioned and put in operation. These experts are not BCS employees but have been deployed to the site for a limited time to complete this task. BCS requests that it be allowed to continue the commissioning of these air monitoring systems and to perform such maintenance activities as are necessary to keep these air monitoring systems fully operational.

Activity to continue	Justification
Test fire protection system and MIC suppression system	The MIC storage building has a fire protection system (sprinkler system) and an MIC vapor suppression system installed. Our insurance carrier requires a live test with water to ensure correct installation. BCS requests that it be allowed to perform testing with each of these systems to ensure that they are correctly functioning.
Safety showers	As part of the MIC Safety Enhancement Project, several new safety showers are to be installed. There are solvents in the system now and these showers are part of the safety system for worker protection inside the unit as it presently exists. BCS requests that it be allowed to complete installation of the safety showers, perform functional testing of them, and maintain them as necessary.
Installation of lighting	The new MIC storage building is a windowless building. Installation of permanent lighting was in progress, but has not been finished. BCS requests that it be allowed to complete the installation of lights in the storage building. This is important for the safety of any person entering the building, even when it is not in service.
Activation of Waste water storage and handling equipment	As part of the MIC Safety Enhancement Project, a new waste water storage and handling system has been installed. This system is intended to replace an existing system consisting of temporary tanks connected with hoses. BCS requests that it be allowed to put the new waste water handling system into operation and maintain it in that condition to improve reliability. The new system has a higher level of reliability than the old system and will reduce the risk of spills and potential water permit violations from the unit as it presently exists.
Freeze protection of piping and equipment.	As part of the project and other maintenance activities, several pieces of equipment have been inspected. Existing insulation and heat tracing had to be removed to perform inspections or do repairs. Because of the low outside temperature, without proper insulation and/or heat tracing, this equipment is at risk of being damaged or destroyed because of internal or external freezing water. BCS requests that it be allowed to continue insulation work and heat tracing work to properly protect this equipment that is at present risk of freeze damage.
Removal of scaffolding	During the installation of new equipment, a large number of scaffolds were installed within the unit perimeter to give workers safe access to work areas. Many of these scaffolds are no longer needed. BCS requests that it be allowed to remove scaffolds no longer needed. Scaffolds restrict the safe access inside the unit and access to some presently operating equipment. It is inherently safer to promptly remove scaffolding no longer in service or needed to perform work.
Repair damaged equipment	BCS requests that it be allowed to complete the now halted repair of a heat exchanger. This repair is necessary to reduce the potential for an NPDES water permit violation.

Activity to continue	Justification
Other engineering or office work	There will be other engineering or "office" work that needs to be done to improve the safety of the unit and the plant as it now exists and to document the overall status of the plant. We also need to allow for activities that may be necessary to reply to and comply with the outstanding US Chemical Hazard and Safety Board public recommendations; and respond to any investigations, inquiries, or actions of other Federal, State, and local agencies which have jurisdiction over the Institute facility.
Install pressure safety devices	As part of equipment inspections, several pressure relief valves and rupture disks which protect vessels from overpressure have been removed. Although these vessels are not in service, it is best engineering practice and protects the interior of the vessels from damage to have all safety equipment installed, even when shut down. BCS requests that it be allowed to reinstall these pressure relief valves and rupture discs.

BAYER CROPSCIENCE, L.P.

By Counsel

/s/ A. L. Emch

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of February 2011 a true and correct copy of the *Emergency Motion for Clarification of and Relief from Temporary Restraining Order; and Request that the Motion be Decided at the Earliest Possible Time* was sent via electronic mail to plaintiffs' counsel.

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